79-1350
No.

Supreme Court, U. S.
FILED
MAR 3 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

JOEL D. RUBIN et al., and JAMES D. ALEX, and JOSEPH RUBENSTEIN, et al.,

Plaintiffs-Petitioners,

vs.

U. N. INDUSTRIES, INC., et al.,

Defendants-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

LAW OFFICES OF:
WILLIAM HENNING RUBIN
188 W. Randolph — 714
Chicago, Illinois 60602
263-6780

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

INDEX

PAGE

Jurisdictional Statement 2

Argument 3

Point One: Reasons for Granting Writ of Certiorari

The newly discovered evidence, the letter addressed to Frank J. Green Jr. Secretary of U. N. Industries, Inc., San Antonio, Texas; and the Telegram acknowledging the receipt of the proceeds of sale, clearly confirms that the sale from Harry Mosser, Sr. to U. N. Industries, Inc. was consummated 3

Point Two: All Oil and Gas Leases and Mineral interests and personal property described in the geological evaluation and report made by C. A. Kuhlmann dated October 1, 1967; (and referred to as Exhibit A in the contract of sale between U. N. Industries, Inc., Paul Dawson and Harry J. Mosser, Sr. dated September 14, 1968) have been fully assigned to U. N. Industries, Inc. and all payments incident to the escrow agreement of November 14, 1968 having been paid 8

Point Three: Harry Mosser, Sr. and the Bank of the Southwest and so-called class counsel are estopped to deny the fact that $80,000 was spent by U. N. Industries, Inc. from the funds it obtained from the shareholders who bought directly from the corporation and not from a broker to drill on the property 14

PAGE

Point Four: The Order modifying the Class definition that:

"All persons who purchased free tradeable shares of stock of U. N. Industries, Inc. on the over-the-counter market through a broker-dealer during the period from July 1st, 1968 to and including December 26, 1968)

Is an erroneous Order and contrary to the authorization received by plaintiffs' class counsel from the shareholders 15

Conclusion 17

Appendix:

Letter of 11/26/68 consummating the sale ....App. 1

Telegram Mosser to Paul Dawson confirming sale .....App. 2

Letter of Gilbert Andreen .....App. 3

U. S. Court of Appeals Order approving settlement .....App. 5

Request for Admissions—Motion by William Henning Rubin to Mosser, Sr. and the Bank of the southwest .....App. 15

AUTHORITIES CITED

Cases

PAGE

In re: Celotex Co. D. C. Del 1935, 12 F Supp 1, 5..... 16

Fay v. Noia, 382 US 391, 9 L Ed 2d 817 6

Gilmore v. Strescon Industries, Inc., 66 FRD 146, 153 12

Greater Boston Television Corporation v. Federal Communications Commission, 463 F 2d 268 16

Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 64 S Ct 997, 88 L Ed 1250 (1944) 17

In re: Indiana Central Tel Co. D. C. Del 1938 24 F. Supp 342 16

In the Matter of Point Building Land Co., D. C. S. D. Pa 1938, 38 A.B.R. N.S. 464 16

Rozier v. Ford Motor Co., 573 Fed Rptr 2d 1332 12

Saenz v. Keridy, 178 F 2d 417, 419 12

In re: Utilities Power & Lt. Corp. D.C. N.D. Ill. 1939, 29 F Supp. 763 16

In the
Supreme Court of the United States

No.

JOEL D. RUBIN et al., and JAMES D. ALEX, and JOSEPH RUBENSTEIN, et al.,
Plaintiffs-Petitioners,

vs.

U. N. INDUSTRIES, INC., et al.,
Defendants-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners Joel D. Rubin, et al., James D. Alex and Joseph Rubenstein respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals approving a settlement offered by Harry Mosser, Sr. and the Bank of the Southwest.

Petitioners Further Petition For A Review of the Order of the United States District Court that modified the class definition that:

> "All persons who purchased free tradeable shares of stock of U. N. Industries, Inc., on the over-the-counter market through a broker-dealer during the period from July 1, 1968 to and including December 26, 1968"

are the only persons who can share in the proceeds of settlement.

The Order of the United States Court of Appeals approving the settlement is included in the Appendix.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1264.

Petitioner seeks certiorari to issue to the United States Court of Appeals requiring it to vacate its order approving the order of the District Court, approving a settlement to be shared in only by "all persons who purchased free tradeable stock of U. N. Industries, Inc. on the over-the-counter market during the period from July 1, 1968 to and including December 26, 1968."

QUESTIONS PRESENTED

Can the Court deny Petitioners the right to rescind the sale to Mosser, Sr. under Rule 60(b), (1), (2) and (3) of the Federal Rules of Civil Procedure when newly discovered evidence confirms that the sale to U. N. Industries, Inc. was consummated to U. N. Industries by Mosser, Sr., as confirmed in a direct telegram to Paul Dawson the then President of U. N. Industries, Inc. (Copy of the telegram is attached hereto as part of the Appendix.)

Can Mosser, Sr. and the Bank of the Southwest jointly be permitted to profit by this transaction of having received jointly in excess of $6,000,000 which neither of them acknowledged until they were required to file an Answer to the Request for Admissions filed by William Henning Rubin against Harry J. Mosser, Sr. and the Bank of the Southwest. (Copy of the Request for Admissions appears in the Appendix hereto.)

ARGUMENT

POINT ONE

REASONS FOR GRANTING WRIT OF CERTIORARI

THE NEWLY DISCOVERED EVIDENCE, THE LETTER ADDRESSED TO FRANK J. GREENE JR., SECRETARY OF U. N. INDUSTRIES, INC. SAN ANTONIO, TEXAS; AND THE TELEGRAM ACKNOWLEDGING THE RECEIPT OF THE PROCEEDS OF SALE, CLEARLY CONFIRMS THAT THE SALE FROM HARRY MOSSER, SR. TO U. N. INDUSTRIES, INC. WAS CONSUMMATED.

The Receiver, Peter V. Fazio, with approval of the Court quitclaimed whatever right, title and interest the Receiver had to those certain oil wells that were previously assigned to U. N. Industries, Inc. to Carmel F. Davis, the brother-in-law of Mosser, Sr.

Mosser, Sr. was never personally released.

That neither the Receiver or his attorney at the time of the conveyance from the Receiver to Carmel F. Davis had any knowledge whatsoever that what the Receiver was conveying was an interest that was owned one hundred percent by U. N. Industries, Inc. and was not a contigent interest, since Mosser led the Receiver and the Receiver's attorney to believe that he had never consented to the sale since he had not received all of the proceeds of the sale.

That statement that he never consented to the sale was found to be completely false and untrue as confirmed by the documents that were discovered after the conveyance was made and the sale confirmed by the Court. Mosser

used the Bank of the Southwest as a crutch, claiming it would not consent. When a request for admissions was filed, the Bank of the Southwest admitted it was paid in full.

The information that the sale was consummated and confirmed by Harry Mosser, Sr. personally to U. N. Industries, Inc. both in the form of a letter and in a telegram was information that was not available to either Fazio or his Counsel Rubin at the time of the conveyance of the *oil runs*. (Emphasis ours).

It was the Widow Kuhlmann who discovered the letter and the telegram at a later date.

Her husband Clarence Kuhlmann was the petroleum engineer who was employed by both U. N. Industries, Inc. and Harry Mosser, Sr. to prepare a map reflecting the exact locations where the leases were located that Mosser, Sr. was conveying to U. N. Industries, Inc.

The letter written on H. J. Mosser Oil and Gas Company stationary, Alice, Texas, under date of November 26, 1968 to Frank J. Greene, executed jointly by Harry J. Mosser, Sr. and Paul Dawson, recites the following:

> "This letter will serve to confirm our agreement whereby all oil and gas leases and mineral interests and personal property described in the Geological evaluation and Report made by C. A. Kuhlmann, dated October 1, 1967, (and referred to as Exhibit A in the Contract of Sale between U. N. Industries, Inc., Paul Dawson and Harry J. Mosser, Sr., dated September 14, 1968) have been fully assigned to U. N. Industries, Inc. and all payments incident to the escrow agreement of November 14, 1968 have been paid.
>
> "S/ Harry J. Mosser, Sr.
>
> "S/ Paul Dawson."

The acknowledgment from Harry Mosser, Sr. that he received from Paul Dawson the sum of $60,000 on February 4, 1969 and that the Contract between Mosser and Dawson is in full force and effect, is an additional item that did not come to light until the *"Widow Kuhlmann" disclosed the existence of the document.* (Emphasis ours).

In neither of the communications—either the telegram or the letter—that the deal was consummated is it made subject to the consent of the Bank of the Southwest.

Under these circumstances, shareholders Joel D. Rubin, et al., James D. Alex and Joseph Rubenstein, et al., have a right to petition the Court with supporting documentation.

Pursuant to Rule 60(b), (1), (2) and (3) of the Federal Rules of Civil Procedure, a Petition to Rescind the sale must be given a complete hearing by the Court.

In fact, the Receiver and Class Counsel should have joined in the Petition to Rescind the sale to those nominees of Mosser, Sr. since the value of those oil leases is not what Mosser, Sr. or the Bank of the Southwest offered to pay the shareholders, but is the value of those oil leases.

The recent communication of Gilbert Andreen, which is being filed with this Petition for Certiorari as part of the Appendix, confirms that for the months of July, August and September of 1979, the oil wells on the leases in question, formerly owned by U. N. Industries, Inc. produced 996,000 M.C.F. at $1.85 per M.C.F.

For that volume of production with eighty percent thereof assigned to U. N. Industries, Inc. calculated at a price of $1.85 per M.C.F., the oil leases on that property are presently producing at the rate of 1⅓ million dollars per year.

The District Court was requested to send the matter to a special magistrate to hold hearings and take evidence on the question of rescission. The District Court denied that.

The United States Court of Appeals also denied the right to have the matter heard by a magistrate who would hold hearings on the question of rescission.

There was no change in the position of either party until Counsel Rubin filed his request for admissions against Harry Mosser, Sr. and the Bank of the Southwest.

When the Bank responded to the Request for Admissions, *it was required for the first time* (emphasis ours) *to admit that it no longer had any debt due it from Mosser, Sr. or his family.*

Up until that point the Bank of the Southwest was used as a crutch by Mosser to constantly state that the Bank will not agree to a settlement of the case when it was offered that U. N. Industries, Inc. surrender fifty percent of the production to the shareholders and fifty percent for Mosser.

The case of *Fay v. Noia,* 382 U.S. 391, 9 L.Ed.2d 817, is exactly in point since that case held that a federal court has broad powers of habeas corpus to hold an evidentiary hearing and determine the facts.

The same principle applies to U. N. Industries, Inc. as under the *Fay* v. *Nois* case, ibid. It was mandatory that an evidentiary hearing be held of all the facts.

The testimony of Paul Dawson the original President who consummated the deal with Harry Mosser, Sr.—at the hearing before the Honorable Bernard Decker—that he received a telegram from Harry Mosser, Sr. acknowledging the consummation of the Contract, and the other

documents, made it mandatory upon the District Court to rescind the sale since that evidence was not available while Paul Dawson was incarcerated.

Neither Mosser nor the Bank of the Southwest revealed the true facts of the case, and yet they seek to do equity and have forgotten the principles: that he who comes into equity must come into equity with clean hands.

The District Court was blinded by the fact that although approximately one million dollars was offered in the settlement, the settlement in today's market if petroleum experts were called in to testify would be around $10,000,000.

The Mosser interests were duty bound to inform the Court that they had paid off the Bank, and it was just a question of consummating a settlement between the litigants which was Harry Mosser, Sr. and the shareholders.

Mrs. Mosser, Sr. was not a bona fide purchaser, and neither was he son who admitted in a deposition taken down in Texas, at which Counsel for Petitioners attended, that he did not know what the entire transaction was all about, and yet Mosser, Sr. was using the son as a pawn to try and claim that he had an interest in the lease.

The record shows that Mosser, Jr. was on the payroll of U. N. Industries, Inc.

POINT TWO

MOSSER HAVING ACKNOWLEDGED ON NOVEMBER 26, 1968 THAT:

> **"ALL OIL AND GAS LEASES AND MINERAL INTERESTS AND PERSONAL PROPERTY DESCRIBED IN THE GEOLOGICAL EVALUATION AND REPORT MADE BY C. A. KUHLMANN DATED OCTOBER 1, 1967 (AND REFERRED TO AS EXHIBIT A IN THE CONTRACT OF SALE BETWEEN U. N. INDUSTRIES, INC., PAUL DAWSON AND HARRY J. MOSSER, SR. DATED SEPTEMBER 14, 1968) HAVE BEEN FULLY ASSIGNED TO U. N. INDUSTRIES, INC. AND ALL PAYMENTS INCIDENT TO THE ESCROW AGREEMENT OF NOVEMBER 14, 1968 HAVING BEEN PAID."**

IS ESTOPPED TO DENY THAT THE SALE WAS CONSUMMATED AND HE COULD NOT HAVE RESCINDED THE SALE.

The information that Harry J. Mosser, Sr. had jointly executed a letter to the above effect, copy of which is enclosed in the Appendix hereto, is newly discovered evidence that was not known either to Peter V. Fazio the Receiver or his Counsel or the Court when Mosser presented an offer using his brother-in-law, Carmel F. Davis as nominee to purchase the right, title and interest of the Receiver to those certain oil leases that were already the property of U. N. Industries, Inc.

The confirmation of the Agreement of November 26, 1968, was not discovered until after the death of Clarence F. Kuhlmann.

Until the discovery of the letter that there had been a complete assignment of the leases, every one was under the impression that the Bank of the Southwest had to consent to the assignment and they were arbitrarily withholding the consent.

The Bank of the Southwest had been used as a crutch and a subterfuge by Harry Mosser, Sr. to attempt to defeat the rights of the shareholders of U. N. Industries, Inc. after confirmation of the sale on November 26, 1968.

Petitioners contend that pursuant to Rule 60(b), (1), (2) and (3) of the Federal Rules of Civil Procedure it was mandatory upon the United States District Court upon the filing of a Petition to Rescind the Sale, that Peter Fazio Receiver had previously made when the Court was apprised of the fact that the receiver was actually selling the rights and title of U. N. Industries, Inc. instead of a contingent interest. Until the discovery of the letter and telegram, the receiver and his counsel had always been under the impression that all of the production of the oil leases belonged to the Bank of the Southwest.

There was no knowledge of the existence of an Agreement; of a telegram from Harry Mosser, Sr. acknowledging the consummation of the sale to U. N. Industries, Inc. until the disclosure by the Widow Kuhlmann. At this point in time the Petition to Rescind the Sale having been filed it was mandatory upon the Court to rescind the sale.

The argument of the Court of Appeals which is set forth in the Opinion of the Court, asserts:

> "The Appellants argue that certain reconveyance of property by the Receiver back to one of the defendants as part of an earlier settlement should be rescinded because the reconveyance was made while the

> receiver lacked certain material information. Upon a review of the proceedings however, it is apparent the district court properly found the receiver had full knowledge of the circumstances surrounding the reconveyance. We are satisfied, furthermore, that substantial and insurmountable difficulties would arise in rescinding a reconveyance that occurred over eight years ago, and the appellants have made no showing that such a rescission could place the parties in the status quo.''

is completely erroneous and untrue since there are no intervening parties other than the Mosser family. In fact, the Court admonished Mosser, Sr. that it was no defense that the oil leases were now in the names of Susan Mosser and other corporations in which they controlled the stock.

The Court of Appeals in assuming that to allow the Petition to Rescind the Sale would affect outside parties or bona fide purchasers, was a completely erroneous finding. In fact the evidence in the trial court confirmed as Petitioner had charged, that:

> ''H. J. Mosser,
> Yegua-Stillwell Gas Corp.
> Central Producers, Inc.
> Texas Oil and Gas Corporation
> Trident Corporation
> Pemac Company
> XRC, Inc.
> J. F. Cichowski
> Cia-Bar Oil & Gas Company, and
> Corpus Christi Management''

were all nominees of Harry Mosser, Sr.

In fact, the record further discloses that it was at this point that the Hon. Judge Decker became impatient and requested that Harry Mosser, Sr. increase his offer when he started to ''dodge'' behind the dummy corporations.

This was as a result of a motion filed by Counsel Rubin that Mosser, Sr. be restrained from disposing, transferring, or hypothecating any of the interests he had in those oil wells.

The Receiver Peter V. Fazio and his Counsel William Henning Rubin at the time that the Court was requested to approve the quitclaiming of title of the Receiver to Carmel F. Davis, Mosser, Sr.'s brother-in-law, and nominee, were of the opinion that U. N. Industries, Inc. only had a contingent interest in those wells.

They were absolutely uninformed that Mosser, Sr. had executed the agreement with Paul Dawson to the effect that *the sale of the oil leases to U. N. Industries, Inc.* was consummated.

That information did not ''surface'' until the death of Clarence Kuhlmann and the discovery that the ''Widow Kuhlmann'' had in her possession both the letter and the telegram that confirmed those facts.

The basis of the Widow Kuhlmann having those documents in her possession was that Clarence Kuhlmann was the petroleum engineer who was jointly employed by U. N. Industries, Inc. and Harry Mosser, Sr. to prepare the map and the exact location of each and every well that was being assigned to U. N. Industries.

The telegram and the letter are the newly discovered evidence that mandated the Court to give close scrutiny to the manipulations that were used both by Mosser, Sr. and by the Bank of the Southwest up until that point to say: ''The sale was never consummated since the Bank of the Southwest never consented.''

The United States Circuit Court of Appeals in *Rozier* v. *Ford Motor Co.*, 573 Fed. Rptr. 2d 1332 finds:

> "One who asserts that an adverse party has obtained a verdict through fraud, misrepresentation or other misconduct has the burden of proving the assertion by clear and convincing evidence." Saenz v. Keridy, 178 F.2d 417, 419; Gilmore v. Strescon Industries, Inc., 66 FRD 146, 153.

Mosser, Sr. knew that he had confirmed the sale "without question" to U. N. Industries, Inc. He also was aware that he had not arranged for the Bank of the Southwest to consent to the oil leases whose assignment he had agreed to.

He also was aware of the fact that he was using the Bank of the Southwest as a crutch; and in fact it was not until he answered including the Bank the request for admissions which came as a surprise and caused the offer of settlement, that it was revealed for the first time that the Bank had been paid in full.

Up until that date everyone including the Receiver was under the impression that it was the Bank of the Southwest that was preventing the shareholders from receiving their interest in U. N. Industries, Inc., which they were rightfully entitled to after paying a cash consideration for the stock.

Rule 60(b) has always been used where information has been wrongfully withheld from the litigants.

Mosser in withholding his information is guilty of perpetrating the fraud as well as the Bank of the Southwest who failed to disclose that they had been paid in full. Since their lawyers actively participated in the proceedings to set aside the sale, they were required to reveal

their trust position and could not hide under the subterfuge that Mosser, Sr. was once indebted to them. This is grounds for rescinding the sale.

The testimony of Paul Dawson, Tr. 26, before Judge Decker that U. N. Industries, Inc. paid for the bills incurred in pumping the oil and operational expenses even though Mosser assigned the receipts from the leases to U. N. Industries, Inc. that it was U. N. Industries, Inc. funds that paid the operational expenses of U. N. Industries, Inc.

This is in conflict with the decision of the Court to award a recovery to those people that purchased from a broker instead of those who purchased from the corporation.

An examination of the testimony of "Cumberland" who testified on the part of the Bank of the Southwest and when the question was propounded: At the time of the conveyance by U. N. of those leases, there was approximately $220,000 that was being withheld by the oil companies.

> "Q. At the time of the conveyance by U. N. of those leases, there was approximately $220,000 that was being withheld by the oil companies in which U. N. as a part of this deal gave a release. Weren't those leases on trust property, or some of those leases on trust property?"

reveals the following answer:

> "A. I can't answer that. I didn't see the source of those released proceeds."

Since it was an officer of the Bank that was testifying, he knew quite obviously from where the funds were coming. Why the cover up? Were they protecting Mosser?

Mr. Gilbert Andreen the petroleum engineer, further advises in his communication that the leases formerly owned by U. N. Industries, Inc. are now under the names of: Suzan Mosser, Mosser Trust, or H. J. Mosser, Sr.

POINT THREE

HARRY MOSSER, SR. AND THE BANK OF THE SOUTHWEST AND SO-CALLED CLASS COUNSEL ARE ESTOPPED TO DENY THE FACT THAT $80,000 WAS SPENT BY U.N. INDUSTRIES, INC. FROM THE FUNDS IT OBTAINED FROM THE SHAREHOLDERS WHO BOUGHT DIRECTLY FROM THE CORPORATION AND NOT FROM A BROKER TO DRILL ON THE PROPERTY.

There is no evidence that has ever been offered or introduced that the Bank of the Southwest objected to U. N. Industries, Inc. drilling on trust property. Furthermore, the checks identified in evidence by Paul Dawson confirmed the fact that U. N. Industries, Inc. paid the cost of pumping of the wells on trust property and not Mosser, Sr. or his oil company.

If not for the funds supplied directly to U. N. Industries by the purchasing shareholders, the entire Mosser, Sr. escapade could never have taken off the ground. It was the purchasing shareholders that provided the capitol for U. N. Industries, Inc. and not the shareholders that purchased from a broker.

POINT FOUR

THE ORDER MODIFYING THE CLASS DEFINITION THAT:

> **"ALL PERSONS WHO PURCHASED FREE TRADEABLE SHARES OF STOCK OF U. N. INDUSTRIES, INC. ON THE OVER-THE-COUNTER MARKET THROUGH A BROKER-DEALER DURING THE PERIOD FROM JULY 1st, 1968 TO AND INCLUDING DECEMBER 26, 1968"**

IS AN ERRONEOUS ORDER AND CONTRARY TO THE AUTHORIZATION RECEIVED BY PLAINTIFFS' CLASS COUNSEL FROM THE SHAREHOLDERS.

Class Counsel previously notified all shareholders that they would be represented unless they objected to the represenation. U. N. Industries paid the cost of this mailing.

The order modifying the class definition was completely illegal and void because of the lack of due process.

By what authorization can you seek to represent a litigant and then "sell him out?"

It was those shareholders who supplied funds to U. N. Industries, Inc. that was used to pay Harry Mosser, Sr. his earnest money deposit plus additional funds both in the purchase of the lease transactions as well as the gypsum mine.

When stock was purchased from a broker, the purchase price never ended up in the treasury of U. N. Industries, Inc. but in the hands of the speculator.

The order modifying the class was a complete sellout of the rights of the shareholders they sought to represent.

The number of shareholders that purchased from a broker compared with the number of shares purchased directly from the corporation is very small.

A great fraud was perpetrated as a result of the Hon. Bernard Decker entering an order modifying the definition of the class.

U. N. Industries, Inc. did not benefit in any way because of the gyrations of the price of stock among brokers.

It has been established law that shareholders or bond holders cannot be limited to the price that they paid therefor, which is supported by the case: *Lorraine Castle Apartment Building Corporation,* 53 Fed. Supp. 994, where the Court held:

> "There is no occasion to limit participation in a plan by the holders of bonds purchased during the pendency of these proceedings to the amount of their cost. In re: Utilities Power & Light Cor., D.C. N.D. Ill. 1939, 29 F. Supp. 763, 770; In re: Celotex Co., D.C. Del. 1935, 12 F. Supp. 1, 5; In re: Indiana Central Tel. Co., D.C. Del. 1938, 24 F. Supp. 342, 344; In the Matter of Point Building Land Co., D.C. S.D. Pa. 1938, 38 A.B.R. N.S. 464, 466."

The decision was confirmed by the Court of Appeals in 14 F.2d 55.

Petitioners call the attention of the Court to the case of: *Greater Boston Television Corporation* v. *Federal Trade Communications Commission,* 463 F.2d 286. The Court in that case establishes the doctrine that a mandate secured by fraud can be reconsidered at any time. The Court specifically stated:

> "There is firmly established in the law the doctrine confirming the power of a court to set aside at any time any mandate that was procured by effecting a fraud on the court. Cord v. Smith, 370 F.2d 418, 423 (th Cir. 1966). In holding that this paramount doctrine overrode the 'term' rule even when that was in force, the Supreme Court said, in Hazel-Atlas Glass

> Co. v. Hartford-Empire Co., 322 U.S. 238, 244, 64 S.Ct. 997, 88 L.Ed. 1250 (1944). . ."

Mosser and the Bank of the Southwest are the biggest perpetrators of the fraud in this cause. They waited twelve years and then only answered that they were paid in full when the request for admissions was filed. Where was the Bank? Where was Mosser all those years when the matter was being contested in the District Court in the matter?

The Andreen Report reflects $1,500,000 as only some of the leases being the annual "take" by Mosser and his associates. Actually: what is the entire income from all the leases?

When one considers that the decision of the Court is to wipe out those persons that purchased their stock directly from the corporation, the greatest injustice has been carried out through judicial channels.

CONCLUSION

It is respectfully submitted that under the case law, Petitioners are entitled to have the sale rescinded based on the discovery of the new evidence that U. N. Industries, Inc. was actually the owner of the oil leases that had been assigned to her by Harry J. Mosser, Inc.

The Bank of the Southwest had been paid in full and was being used as a crutch by Mosser, Sr.

That it was only after the filing of the Request for Admission by Counsel Rubin that the Bank was obligated to come forward and declare without hesitancy that it had been paid in full.

It is therefore quite obvious that this proceeding was brought not to protect speculators who bought shares from

a broker, but the persons that purchased shares directly from the corporation which was the "backbone" of the entire transaction.

One hundred million dollars could have been paid to brokers, but that would not have given the corporation one penny to pay a single worker for the work performed at an oil pump, or to pay for the electricity for pumping the oil or to the operator of the oil truck that delivered the oil to the refinery.

It is respectfully submitted that the Petition for Certiorari should issue forthwith.

Respectfully submitted,

WILLIAM HENNING RUBIN,
One of the Attorneys for and on behalf of:

JOEL D. RUBIN, *et al.*,
Plaintiffs-Appellants, on behalf of himself and all other shareholders of the Class; and,

U. N. INDUSTRIES, INC,
Plaintiff-Appellants, pursuant to Amendment to the 4th Amended Complaint; and,

JAMES ALEX, *et al.*,
Shareholders for and on behalf of himself and all other shareholders of his class.

Law Offices Of:
WILLIAM HENNING RUBIN
188 W. Randolph — 714
Chicago, Illinois 60601
263-6780

APPENDIX

H. J. MOSSER OIL & GAS COMPANY

P. O Box 145
ALICE TEXAS

November 26, 1968

Mr. Frank J. Greene
Secretary, U.N. Industries, Inc.
1600 N.E. Loop 410
San Antonio, Texas

Dear Mr. Greene:

This letter will serve to confirm our agreement where by all oil and gas leases and mineral interests and personal property described in the Geological Evaluation and report made by C.A. Kuhlmann, dated October 1, 1967 (and referred to as Exhibit A in the contract of sale between U.N. Industries, Inc., Paul Dawson and Harry J. Mosser, Sr., dated September 14, 1968) have been fully assigned to U.N. Industries, Inc. and all payments incident to the escrow agreement of November 14, 1968 have been paid.

Very truly Yours,

/s/ *Harry J. Mosser, Sr.*
Harry J. Mosser, Sr.

/s/ *Paul Dawson*
Paul Dawson

HJM,Sr./as

WESTERN UNION TELEGRAM

236P PDT OCT 22 68. LB226 NSB360

NS HSE191 113 Q2 EXTRA RX PDB HOUSTON TEX 22 327P CDT

PAUL DAWSON, PRESIDENT PERSONAL DELIVERY REPORT DELIVERY

UN INDUSTRIES INC 9541 WEST PICO BLVD LOSA

ON SEPTEMBER 14 1968 CONTRACT OF SALE AND AGREEMENT WAS MADE BY AND BETWEEN HARRY J. MOSSER, SELLER, AND UN INDUSTRIES INC, BY ITS PRESIDENT, PAUL DAWSON, BUYER. THE CLAUSE WHERE BUYER IS TO PAY $300,000 HAS BEEN REDUCED TO $120,000 TO BE PAID WEDNESDAY, OCTOBER 23, 1968, AND BALANCE OF ORIGINAL $300,000 WILL BE ADDED TO DEBENTURE MONEY TO BE OBTAINED AS PER ORIGINAL AGREEMENT. ALL AGREEMENTS OF ORIGINAL CONTRACT WILL THEN BE CARRIED OUT. FURTHERMORE, UN INDUSTRIES INC, AGREES TO IMMEDIATELY START REWORKING WELLS DISCUSSED IN BENBOLT AREA TO OBTAIN INCOME TO HELP SELL DEBENTURES. THIS IS IN ACCORDANCE WITH MOSSER'S AGREEMENT WITH BANK OF THE SOUTHWEST

HARRY J MOSSER

NOT IN OFC
LEFT WORD TO CALL IF COMES
IN TONITE IF NOT WILL DLR AM

14 1968 $300,000 $120,00 23 1968 $300,000
(339).

G. M. ANDREEN & ASSOCIATES
CONSULTANTS
OIL — GAS — MINERALS

February 5, 1980

Mr. William H. Rubin, Esq
188 W. Randolph St. Suite 714
Chicago, Illinois 60601

Dear Mr. Rubin;

Pursuant to your request the production records kept by Dwights were reviewed to ascertain the current status of those leases involved in the Mosser-UN Industries transaction.

Gas production figures were readily available for the period of July, August, September of 1979. During this three month period, the gross gas production from wells on the leases involved amount to 249,109 MCF of gas. Using the foregoing figure as a base, the annual production for 1979 is expected to be approximately 996,000 MCF of gas. If a working interest of 80% and a price of $1.85 is assumed, the value of the 1979 production to the owners of the position that UNI should now hold is approximately $1,475,000.

It was noted that most of the currently producing wells are now completions which should produce for several years. A schedule of the news wells follows.

Old wells.....6
1976.....4
1977.....3
1978.....8
1979.....7

Several locations for additional wells have been applied for and will probably be drilled shortly. The fields involved i.e. Alice, Reynolds. Ben Bolt and Orange Grove have been and still are active drilling areas.

It was also noted that the wells on leases styled H.J. Mosser, Suzann Mosser, or Mosser Trust account for 38% of the current production and in 1979 yielded approximately $560,000 to the owners of the working interest in these leases.

The loss to UN Industries and/or its stockholders from the failure of the Mosser transaction based on recorded production now exceeds $10,000,000 and is increasing at a rate of $1,500,000 per year. The total future loss may equal that accrued to date.

If we can be of additional assistance on this matter, please advise.

Very truly yours,

/s/ *G. M. Andreen*
G. M. Andreen

GMA:bls

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOEL D. RUBIN, et al,

Plaintiffs,

vs.

U. N. INDUSTRIES, INC., et al,

Defendants

CIVIL ACTION — Number 70 C 189
Consolidated with:
Number 70 C 336 and
Number 70 C 349

PETITION TO RESCIND SALE OF CERTAIN OIL LEASES EXECUTED TO CARMEL F. DAVIS, NOMINEE FOR HARRY MOSSER, SR., PURSUANT TO ORDER OF COURT, ENTERED ON JUNE 30, 1971

NOW COME PLAINTIFFS JOEL D. RUBIN, et al, for and on behalf of themselves and the majority of all other shareholders and for and on behalf of U.N.Industries, Inc. and—pursuant to Rule 60(b)(1),(2) & (3) of the Federal Rules of Civil Procedure—petition the Court for the vacation of the Order entered on June 30, 1971 conveying certain oil leases to Carmel F. Davis, nominee for Harry Mosser, Sr., and to rescind the sale.

That, in support of this Petition, PLAINTIFFS-MAJORITY SHAREHOLDERS represent unto this Court as follows:

1. That the Order that was entered on June 30, 1971 assigning certain oil leases to Carmel F. Davis, nominee for

Harry S. Mosser, Sr., was predicated on the representation by Harry Mosser, Sr., the Bank of the Southwest National Association of Houston, Texas, acting as Trustee for and on behalf of the Mosser children as well as his wife, Suzanne Mosser, and Harry Mosser, Sr., that the Bank had refused in good faith to consent to assignment of twenty-five (25%) percent of the oil production to U. N. Industries, Inc., on those properties where the Bank had a prior lien, and that the Bank had the sole authority to consent to the assignment of the 25 percent of the oil production from the leases;

2. Other factors have since come to the attention of Plaintiffs-Shareholders indicating that Harry Mosser, Sr. dictated the action taken by the Bank in refusing to consent, after he had "pocketed" the $300,000 of U. N. funds.

3. That the Agreement covering the Order of June 30, 1971 (copy of which is attached hereto and made a part hereof and incorporated as Exhibit A) further provides that U. N. Industries, Inc. will receive one sixty-fourth (1/64) interest in all oil production of wells drilled on the property leased from Charles W. Muil, Independent Executor of the Estate of Charles Muil, deceased.

4. That immediately following the payment of the $300,000 to Harry S. Mosser, Sr., and the delivery of the 3,000,000 shares of U. N. Industries stock, Lawrence Warburton, Attorney for Harry Mosser, Sr., advised Plaintiff, U. N. Industries, Inc., that Harry Mosser, Sr. would arrange with the Bank to assign to U. N. Industries 25 percent of the production and he "anticipated no difficulty" in obtaining the consent of the Bank.

5. That the investigation further discloses that Harry Mosser, Sr., Carmel F. Davis and the Bank of the Southwest National Association of Houston as Trustee of the Mosser interests further conspired to defeat the agreement

between Carmel F. Davis as nominee for the Mosser interests and Receiver Peter V. Fazio which provided that U. N. Industries, Inc. would retain a 1/64th interest in the 1617-odd acres of land which was covered by a lease from Charles W. Muil Independent Executor of the Estate of Charles Muil, Deceased.

6. That Carmel F. Davis and his associates, prior to the confirmation of the sale of the interest of the receiver insisted that the annual rental of $4034.75 be paid to Charles W. Muil independent executor of the Estate of Charles Muil, deceased, concurrently with the conveyance by the Receiver.

7. That the receiver issued his check to Charles W. Muil covering the sum of $4034.75 and placed a restrictive endorsement on the check.

8. That to further protect all of the parties against a default being declared by Charles W. Muil, the independent executor, Counsel for Plaintiffs-shareholders and the receiver obtained a preliminary injunction against Charles W. Muil as Independent executor, and caused an injunction writ to be served by the U. S. Marshall for the area in which Charles W. Muil is located.

9. That the docket of this case reflects the issuance of the preliminary injunction and the service of the writ by the Marshall.

10. That as a further conspiracy to defraud plaintiff, U.N.Industries, Inc., and its shareholders, the Defendant Harry Mosser, Sr., and his associates, Carmel F. Davis and Defendant Harry J. Mosser, Jr. and Jo Suzanne Mosser Shanks, entered into a conspiracy with Joseph F. Cichowski and Charles W. Muil as independent executor of the estate of Charles Muil deceased, to defraud U. N. Industries, Inc. of its 1/64th interest and on June 8, 1972, executed a new lease covering the 1617-odd acres of land in Jim Wells County, Texas, pursuant to the terms of which U. N.

Industries Inc. was deprived of its 1/64th interest in the oil production.

11. That Charles F. Cichowski is the same individual with whom the Bank executed an Agreement on the 1st of December, 1971 for the drilling of the certain areas eliminating the 1/64th interest of U. N. Industries, Inc.

12. That the signature of Charles W. Muil as independent executor of the Estate of Charles Muil Deceased, is notarized by Lawrence H. Warburton,Notary of Jim Wells County, Texas; Mosser's attorney.

13. That a copy of the oil, gas and mineral lease signed is attached as Plaintiff's Exhibit B, and incorporated and made a part of this Motion.

14. That the Receiver quitclaimed his interests in certain oil production to Carmel F. Davis as nominee for Harry Mosser, Sr., on the representation that the Mosser interests had paid the electric bills for pumping the oil from 1968 to 1971.

15. That the representation was completely false and untrue and the records disclose that Paul Dawson as Trustee for U. N. Industries paid from his trustee account the utility bills to pump the oil.

16. That it was that oil production pumped with the electricity paid for by U. N. Industries, Inc. that was reassigned to Carmel F. Davis, nominee for Mosser.

17. That Counsel for Plaintiffs-Shareholders, William H. Rubin ascertained subsequent to the assignment that following the discontinuance of the payment of the utility bills by Paul Dawson, that the oil gushed from the ground by its own force since Mosser Sr. and his company, Mosser Gas and Oil Company had failed to pay any of the utility bills contrary to their representations.

18. Paul Dawson, the former President of U. N. Industries, Inc., who was incarcerated, has recently been released and he has produced a copy of a resolution of Plaintiff, U. N. Industries, Inc., that Harry Mosser, Sr., was made the Chairman of the Committee of the Board of Directors of an oil exploration and had complete charge, including the designation of the particular oil leases where the drilling was to take place, and the exact spot where the drill was to be inserted into the ground.

19. At a Board of Directors meeting, Harry Mosser, Sr. made the exact statement that, "I'll bet my bottom dollar on the amount of oil contained in my leases."

20. That Plaintiff-Shareholders have just become aware, pursuant to a survey prepared by G. M. Andreen, registered professional engineer, pursuant to Report dated November 8, 1976, (copy of which is hereto attached and incorporated and made a part of this Petition as Exhibit Numbered C), that the Bank of the Southwest National Association of Houston, Texas, as trustee for Harry J. Mosser, Jr. and Jo Suzanne Mosser Shanks under the agreement of November 10, 1944, executed a lease covering specific leases reconveyed to Carmel F. Davis guaranteeing a lease to Joseph F. Cichowski for drilling oil and gas et cetera. That said lease fails to provide for a 1/64th interest to the U. N. Industries, Inc.

21. That the Agreement of September 1, 1971 between the Bank of the Southwest as Trustee and Cichowski, is a deliberate attempt to avoid the Agreement entered into between Carmel F. Davis nominee for Harry S. Mosser, Sr. and Peter V. Fazio, Receiver, which provided for the payment of the 1/64th interest in production.

22. That the said oil and gas lease was executed on behalf of the Bank of the Southwest as Trustee by R. S. Neuhaus, Bank Officer, who took part in the negotiations

between the Bank of the Southwest and U. N. Industries, Inc. in 1968 and was fully acquainted that U. N. Industries retained a 1/64th interest in the leases that Peter V. Fazio reconveyed to Carmel F. Davis.

23. That the Andreen Report confirms that for the first six months of 1976, 765,798 barrels of oil were produced from the McCarthy-Mosser Trust Number 1, M. Schutte, M. Holmes, C. Dodd, G. Franks, J. Ring, and Mosser Trusts (plus information PJA, SI leases, P & A SI gas wells).

24. That in addition, in the year 1976 204,283 barrels were produced. From January 1, 1976 to May 1, 1976 eight wells have been drilled on the Mosser property.

25. That thus far, not a single dollar has been received from any of the production on the Mosser properties or the Muil properties by U. N. Industries, Inc.

26. The Plaintiffs-Shareholders are prepared to refund to Carmel F. Davis, Sr., nominee for Harry S. Mosser, Sr., the sum of $50,000 concurrently with the Order of Court rescinding the sale to Carmel F. Davis and the reconveyance of those leases to Plaintiff, U. N. Industries, Inc., the interest of which was heretofore quitclaimed by Peter V. Fazio, Receiver.

27. That Plaintiffs-Shareholders are prepared to refund to Carmel F. Davis, Sr. $25,000.00 heretofore paid to Peter V. Fazio, Receiver, concurrently with the reassignment of twenty-five (25) percent of the oil runs to U. N. Industries, Inc., heretofore released by Peter V. Fazio Receiver on behalf of Plaintiff, U. N. Industries, Inc.

WHEREFORE, THE MAJORITY PLAINTIFFS-SHAREHOLDERS HEREBY PRAY as follows:

A. That an Order be entered rescinding the agreement between Peter V. Fazio Receiver and Carmel F. Davis as

nominee for Harry S. Mosser, Sr., and vacating the Order conveying the interests of U. N. Industries, Inc. in certain oil leases to Carmel F. Davis, nominee.

B. MAJORITY PLAINTIFFS-SHAREHOLDERS FURTHER PRAY that concurrently with the reconveyance of those oil leases to U. N. Industries, Inc., that the Receiver Peter V. Fazio pay to Carmel F. Davis Sr. providing said leases have not been encumbered with additional liens or claims not in existence at the time of the conveyance to Carmel F. Davis, Sr. the sum of $50,000.

C. The MAJORITY OF PLAINTIFFS-SHAREHOLDERS FURTHER PRAY That Carmel F. Davis, nominee and or Defendant HARRY S. MOSSER, SR., and/or Defendant BANK OF THE SOUTHWEST, pay to U. N. Industries, Inc., 25 percent of the amount of the oil runs received by each of them or all of them from the date of the conveyance pursuant to Court Order entered on June 30, 1971.

D. MAJORITY OF PLAINTIFFS-SHAREHOLDERS FURTHER PRAY That Defendants, Carmel F. Davis, HARRY S. MOSSER, SR., and/or BANK OF THE SOUTHWEST, pay to U. N. Industries, Inc., 25 percent of the oil runs received by Peter V. Fazio as Receiver, pursuant to the Court Order entered June 30, 1971 providing that U. N. Industries, Inc. concurrently repays to Carmel F. Davis, Sr. as nominee for Harry S. Mosser Sr. the $20,965.25.

E. MAJORITY PLAINTIFFS-SHAREHOLDERS FURTHER PRAY That Defendants HARRY S. MOSSER, SR., and CARMEL F. DAVIS nominee for HARRY S. MOSSER, SR., account to Plaintiff U. N. INDUSTRIES, INC., for all funds received from the gypsum mine oper-

ated by J. P. Boone which interest was assigned to U. N. Industries, Inc., including all of the stock of Mosser Oil and Gas Company.

F. MAJORITY PLAINTIFFS-SHAREHOLDERS FURTHER PRAY That H. J. MOSSER, INC. reassign all of the stock of Mosser Gas and Oil Company that the Receiver delivered concurrently with the execution of the quitclaim deeds to certain oil leases.

G. MAJORITY PLAINTIFFS-SHAREHOLDERS FURTHE PRAY That they may have such further relief as the Court may deem proper.

JOEL D. RUBIN, et al, for and on
Behalf of himself and the Majority
of Plaintiffs-Shareholders of
U. N. INDUSTRIES, INC.,

By .....
WILLIAM HENNING RUBIN
One of its attorneys.

Law offices of:
WILLIAM HENNING RUBIN
188 W. Randolph — 714
Chicago, Illinois 60602
263-6780

AFFIDAVIT

WILLIAM HENNING RUBIN on oath duly sworn deposes and says:

1. That he filed the original proceedings in this case;

2. That he is one of the attorneys for the Plaintiffs-Shareholders owning in excess of fifty percent of the issued and outstanding stock of U. N. Industries, Inc.

3. That he has received specific designations from in excess of fifty percent of the issued and outstanding stock of U. N. Industries, Inc. to petition the court for the removal of the Receiver and the restoration of the corporation to the shareholders.

4. That in 1971 when the proceedings were negotiated between plaintiffs-shareholders and the Bank of the Southwest Association, and Carmel F. Davis as nominee for Harry S. Mosser, Sr., Lawrence F. Warburton acted as attorney for Harry Mosser and Carmel F. Davis, and the law firm of Fulbright and Jaworski acted as attorney for the Bank of the Southwest, and your affiant acted as attorney for the Receiver as well as one of the attorneys for the Plaintiffs-shareholders.

5. That the representations referred to in this petition were specifically made by written communications, the documentary evidence of which is in the possession of Peter V. Fazio the Receiver, and by telephone conversations between counsel for petitioners, Peter V. Fazio and William Henning Rubin, all of said conversations having taken place in conference calls at the offices of Chapman & Cutler at 111 West Monroe Street, Chicago, Illinois;

6. That the representations made in this Petition are true in substance and in fact.

AFFIANT FURTHER SAITH NAUGHT.

.....

William Henning Rubin

SUBSCRIBED AND SWORN TO
before me this ..... day
of January, 1977.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

VERIFICATION

WILLIAM HENNING RUBIN, on oath deposes and says that he is one of the attorneys for Plaintiff in the above-entitled action; that he has made a thorough examination of the books and records of U. N. INDUSTRIES, INC.; that he has a thorough knowledge of the transactions that transpired between Defendant, U. N. INDUSTRIES, INC., and the parties-Defendant hereto; that the statements made in this Fourth Amended Complaint are true in substance and in fact, except as to those matters which are stated to be upon information and belief and as to such matters Affiant is informed and belives that the same are true.

/s/ *William Henning Rubin*
William Henning Rubin

SUBSCRIBED AND SWORN to
before me this 14th day
of February, 1974.
/s/ *Bonnie Burke*
Notary Public

70 C 189

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOEL D. RUBIN, et al,
Plaintiffs,
versus NUMBER 70 C 189
U. N. INDUSTRIES, INC., et al,
Defendants

REQUEST FOR ADMISSION BY HARRY J. MOSSER, SR., AND THE BANK OF THE SOUTHWEST, PURSUANT TO RULE 36 OF THE RULES OF CIVIL PROCEDURE

Request by PLAINTIFF U. N. INDUSTRIES, INC., for admission by DEFENDANT HARRY J. MOSSER, SR., and the BANK OF THE SOUTHWEST, Pursuant to Rule 36 of the Federal Rules of Civil Procedure, of the following:

1. That the Bank of the Southwest and Harry J. Mosser, Sr. either individually or jointly received the sum of $7,760,000 or more from oil production from the leases that were originally assigned to U. N. Industries, Inc., and which he had agreed to assign to U. N. Industries, Inc. as more fully described in the Geological Evaluation and Report made by C. A. Kuhlmann dated October 1, 1967, and referred to as Exhibit A in the Contract of Sale between U. N. Industries Inc., Paul Dawson and Harry J. Mosser,

Sr. dated September 14, 1968, from January 1, 1969 to January 1, 1976.

2. That on November 26, 1968 Harry J. Mosser, Sr. and Paul Dawson jointly addressed a letter to Frank Greene Secretary of U. N. Industries, Inc., confirming that:

> "This letter will serve to confirm our agreement whereby all oil and gas leases and mineral interests and personal property described in the Geological Evaluation and report made by C. A. Kuhlmann, dated October 1, 1967 (and referred to as Exhibit A in the contract of sale between U. N. Industries, Inc., Paul Dawson and Harry J. Mosser, Sr. dated September 14, 1968) have been fully assigned to U. N. Industries, Inc. and all payments incident to the escrow agreement of November 14, 1968 have been paid."

3. That on November 26, 1968 Harry J. Mosser, Sr. acknowledged that he received the sum of $60,000 from Paul Dawson and that the contract between Mosser and Dawson was in full force and effect.

4. That on November 22, 1968 Harry Mosser, Sr. addressed a telegram to Paul Dawson President of U. N. Industries, Inc. confirming that all agreements of the original contract will be carried out when $120,000 is paid to him in accordance with Mosser's agreement with the Bank of the Southwest.

5. That in the first six months of 1977 Harry J. Mosser Sr. and the Bank of the Southwest either individually or jointly received an average of $34,384 or more per month from oil production of the leases that he personally assigned to U. N. Industries, and those leases that he had agreed to assign.

6. That the debt of Mosser to the Bank of the Southwest has been paid in full or the Bank has paid to Mosser

or his associates either part or all of the $7,760,000 that it received in payment of oil production from the various leases, from January 1, 1969 to January 1, 1976.

7. Pursuant to provisions of Rule 36, the request for admission shall be admitted unless within thirty (30) days after service of these requests the Defendants, Harry J. Mosser Sr., and the Bank of the Southwest serves upon Plaintiff U. N. Industries, Inc., a written answer signed by the Defendants.

Dated at Chicago, Illinois
This September 23, 1977

U. N. INDUSTRIES, INC.,
Plaintiff
By /s/ *William Henning Rubin*
William Henning Rubin
One of its Attorneys

Law Offices of:
WILLIAM HENNING RUBIN
188 W. Randolph — 714
Chicago, Illinois 60601
263-6780

Supreme Court, U.S.
FILED
MAR 7 1980
MICHAEL RODAK, JR., CLERK

No. 79-1350

In the Supreme Court of the United States

JOEL D. RUBIN et al., and JAMES D. ALEX, and JOSEPH RUBENSTEIN, et al.,

Plaintiffs-Petitioners,

vs.

U. N. INDUSTRIES, INC., et al.,

Defendants-Respondents.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

LAW OFFICES OF:
WILLIAM HENNING RUBIN
188 W. Randolph — 714
Chicago, Illinois 60602
263-6780

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

In the
Supreme Court of the United States

No.

JOEL D. RUBIN et al., and JAMES D. ALEX, and JOSEPH RUBENSTEIN, et al.,

Plaintiffs-Petitioners,

vs.

U. N. INDUSTRIES, INC., et al.,

Defendants-Respondents.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INDEX

PAGE

Appendix—

Opinion of the Seventh Court of Appeals dated October 30, 1979 ..... App. 19

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
Argued September 24, 1979
October 30, 1979.

Before
Hon. Luther M. Swygert, Circuit Judge
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. William J. Bauer, Circuit Judge

JOEL D. RUBIN, et al.,

Plaintiffs-Appellants,

Nos. 78-1463, 79-1071, 1072, 1173 vs.

U. N. INDUSTRIES, INC., et al.,

Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 70 C 189

Bernard M. Decker, *Judge*

Appellants have come before this court expostulating multifarious objections to and concerning a class action settlement agreement entered in the district court. Although it was most difficult to discern precisely appellants' complaints from the convoluted, confusing, and fragmented approach to the issues taken in their briefs, we believe the arguments basically concern two main issues: (1) whether the settlement agreement was fair and reasonable particularly in the light of the class membership limitations pre-

scribed by the district court; and (2) whether the district court properly refused to remove a receiver previously appointed by it to oversee the operations of the corporation, U. N. Industries.[1]

THE SETTLEMENT AGREEMENT

It is well established that a settlement approval by the district court will not be overturned absent a clear showing of the trial court's abuse of its discretion. *McDonald* v. *Chicago Milwaukee Corp.*, 565 F.2d 416 (7th Cir. 1977). The relevant factors to be utilized in evaluating a settlement agreement are: (1) the strength of the plaintiff's case on the merits balanced against the consideration offered; (2) the defendant's ability to pay; (3) the complexity, length, and expense of further litigation; and (4) the degree of support for and opposition to the settlement. *Manual for Complex Litigation* §1,46 at 30 (1977). After a complete examination of the briefs filed before this court and a thorough review of the proceedings below as presented in the briefs and at oral argument, we are convinced that the settlement agreement was fair and reasonable to all parties when evaluated in light of the above listed factors. The appellees have set forth some or most of their arguments on the merits and have candidly admitted the varying degrees of potential success against these defendants. They have also particularized the various defendants' ability to pay potential judgments and have described the expected

[1] We note that the jurisdiction for this appeal is apparently based upon Fed. R. Civ. P. 54(b) and the final judgment entered below as to some of the defendants. Given this limited "finality" of the lower court's judgment, we believe substantial questions exist as to the appealability of the receivership question at this time. However, in the interest of bringing this long, extended litigation to a final close, we will consider the merits of this contention here.

complexity, length and expense of further litigation. In light of the fact that appellants here are, evidently, the sole objectors to the settlement agreement, we find the district court properly exercised its discretion in granting its approval.

Appellants' main objection to the agreement appears to be that it apparently excluded them from sharing in the class recovery. The district court limited membership in the class to those individuals who purchased free-trading (non-legend) shares on the over-the-counter market through a broker-dealer from July 1, 1968 to and including December 26, 1969. The district court, however, also made membership available to all individuals who could show they were damaged by the defendants' alleged misconduct. Appellants purchased their shares directly from the corporation, sometimes, apparently, without giving consideration, and as yet have been excluded from the class.

We believe the district court's decision to limit membership in the class as described above was fair and reasonable to all involved. Appellees have shown that those excluded were shareholders whose interests in recovering were either unsupportable or potentially antagonistic to the great majority of the remaining members. Furthermore, the district court's order did not preclude any individuals with a valid claim from participating in the recovery. In light of these considerations, we can find no fault in the district court's orders approving the settlement agreement.

THE RECEIVER

Appellants have also objected to the trial court's refusal to remove the receiver previously appointed by it to oversee the operations of U. N. Industries. However, they have utterly failed to present any facts justifying, or "good rea-

son'' for, such a removal. *United States* v. *Lias,* 135 F. Supp. 35 (N.D.W.Va., 1955). Appellants' main objection is that the receivership should be terminated because a ''majority'' of the shareholders of U. N. Industries voted for its termination at a ''shareholders meeting.'' Even if such a vote, if valid, could in some way override or be binding upon the district court in this situation, which we question, we believe the district court correctly determined that the ''vote'' was a nullity. The court found that substantial questions existed regarding the validity of the shares voted at the so-called meeting, and the adequacy of the notice that the meeting was to be held. In light of these facts, the district court, in our opinion, properly exercised its discretion in refusing to remove the receiver.

REMAINING CONTENTIONS

We find the remainder of the appellants' sundry contentions also without merit. Appellants argue that a certain reconveyance of property by the receiver back to one of the defendants as part of an earlier settlement should be rescinded because the reconveyance was made while the receiver lacked certain material information. Upon a review of the proceedings, however, it is apparent the district court properly found the receiver had full knowledge of the circumstances surrounding the reconveyance. We are satisfied, furthermore, that substantial and insurmountable difficulties would arise in rescinding a reconveyance that occurred over eight years ago, and the appellants have made no showing that such a rescission could place the parties in the status quo. We, therefore, affirm the district court on this issue.

As to the limitations placed by the trial court upon appellants' attorney's participation in the proceedings below, we can only say that after reviewing the proceedings as

set forth in the briefs and at oral argument, it appears to us that the trial court exhibited far more patience than was reasonably necessary or called for in tolerating appellants' attorney's conduct. It is apparent that this protracted litigation has already been greatly prolonged by appellants' attorney's unwarranted and unfounded accusations, objections, and general deportment below. After a full review of those proceedings, it is clear that appellants' claim that they were not given a full and fair hearing is without merit.

We find no merit in any other matter referred to in the course of the appellants' rambling brief.

CONCLUSION

For the foregoing reasons, the orders of the trial court here under review are affirmed.

ORDERS AFFIRMED.

79-1350

Supreme Court, U.S.
FILED
APR 14 1980
MICHAEL RODAK, JR., CLERK

No.

In the

Supreme Court of the United States

JOEL D. RUBIN et al., and JAMES D. ALEX, and JOSEPH RUBENSTEIN, et al.,
Plaintiffs-Petitioners,

vs.

U. N. INDUSTRIES, INC., et al.,
Defendants-Respondents.

JOINT ANSWER ON BEHALF OF THE RECEIVER AND THE PLAINTIFF'S CLASS-RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

JAMES P. CHAPMAN
33 North Dearborn Street
Chicago, IL 60602
263-0789

WILLIAM J. HARTE
111 West Washington Street
Chicago, IL 60602
726-5015
Attorneys for Plaintiffs-Class

JOHN J. CASSIDY, JR.
115 South LaSalle Street
Chicago, IL 60603
781-2227
Attorney for the Receiver

The Scheffer Press, Inc.—(312) 263-6850

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdictional Statement	1
Questions Presented for Review	2
Statement of the Case	3
Summary of the Argument	3
Argument	4
I. THE COURT OF APPEALS PROPERLY AFFIRMED THE DISTRICT COURT'S DETERMINATION THAT THE TERMS OF THE SETTLEMENT OF THIS ACTION AS TO CERTAIN DEFENDANTS WERE FAIR AND REASONABLE.	4
A. The Purported Newly Discovered Evidence	4
B. There Was No Basis For Rescission	5
II. THERE WAS NO ERROR IN THE REDEFINITION OF THE CLASS	8
1. Reasons for the Redefinition	8
2. Redefinition of the Class Does Not in Any Event Preclude Valid Claims	9
Conclusion	11

APPENDIX

Findings of Fact and Conclusions of Law Pursuant to District Court order of December 22, 1978	1a
Order of December 22, 1978, Approving Settlement	12a

PAGE

TABLE OF AUTHORITIES

CASES

Babcock v. Farwell, 245 Ill. 14, 91 N.E. 683 (1910) 6

Delta Investing Corp. v. Moore, 336 F.2d 516 (6th Cir. 1966) 6

Howard v. Howard, 122 Vt. 27, 163 A.2d 861 (1960) .. 6

Jockusch, Davidson & Co. v. O.T. Lyon & Son, 100 Tex. 594, 102 S.W. 396 (1907) 5

Van Koten v. Van Koten, 323 Ill. 323, 154 N.E. 146 (1924) 5

RULES

Federal Rules of Civil Procedure 60(b)(2) 4

Federal Rules of Civil Procedure 59(b) 4

Rule 10(b)(5) of the Rules of the Securities and Exchange Commission, 17 C.F.R., §240.10b-5 9

Section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. §78(j)(b) ..... Appendix 1a

Section 17(a) of the Securities Act of 1934, 15 U.S.C. §77(g)(a) ..... Appendix 1a

OTHER AUTHORITIES

Restatement of Contracts, Sec. 349 (1932) 5

IN THE

SUPREME COURT OF THE UNITED STATES

No.

JOEL D. RUBIN et al., and JAMES D. ALEX, and JOSEPH RUBENSTEIN, et al.,

Plaintiffs-Petitioners,

vs.

U. N. INDUSTRIES, INC., et al.,

Defendants-Respondents.

JOINT ANSWER ON BEHALF OF THE RECEIVER AND THE PLAINTIFF'S CLASS-RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Seventh Circuit is accurately stated in the Supplemental Appendix. The district court's findings of facts and conclusions of law are included in the Appendix to this Answer.

JURISDICTIONAL STATEMENT

The Jurisdictional Statement of petitioner is well-stated. Respondents contest the statement of petitioners insofar as it purports to raise a question of any substance for this Court's consideration. No constitutional questions are raised by petitioners.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals properly affirm the district court's decision that the terms of the settlement agreement were fair and reasonable.

   a) in view of petitioners' claimed newly discovered evidence; and

   b) in view of petitioners' contention that the conveyance of oil leases by the Receiver should be rescinded?

2. Did the Court of Appeals properly affirm the district court's order modifying the class definition in this cause.

STATEMENT OF THE CASE

This is an action brought by shareholders of U.N. Industries, Inc. ("UNI"), a Utah corporation against defendants, including certain former officers, directors, major shareholders, and employees of UNI for alleged violations of the securities laws and other charges. Count I alleges a class action and Count II alleges a shareholders' derivative action. (Counsel for petitioners purport to sue on behalf of the shareholders as a class. Actually, counsel for petitioners is not class counsel and petitioners are but a few shareholders.) In due course, certain of the defendants proposed a settlement, the fairness of which was approved by the district court after notice and hearing. The district court entered Findings of Fact and Conclusions of Law which appear in the Appendix to this Answer. Petitioners objected to the settlement, and upon entry of the order approving the settlement, these defendants were dismissed and petitioners appealed.

By unanimous decision, the Court of Appeals affirmed the orders of the district court in all respects. (Pet. Supp. App., pp. 19-23).

SUMMARY OF THE ARGUMENT

It is the contention of respondents that the questions raised by petitioners here have been raised on many occasions in various Courts of Appeals decisions. The district court properly determined that the terms of the settlement of this class and derivative action as to certain defendants were fair and reasonable. The class necessarily was redefined in view of the antagonistic claims of the certain segments of the class as originally defined.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY AFFIRMED THE DISTRICT COURT'S DETERMINATION THAT THE TERMS OF THE SETTLEMENT OF THIS ACTION AS TO CERTAIN DEFENDANTS WERE FAIR AND REASONABLE.

A. The Purported Newly Discovered Evidence.

Petitioners contend that because of the discovery of "new evidence" (the telegram) the court should grant a hearing relative to a petition for rescission of certain reconveyances. Under Rule 60(b)(2) of the Federal Rules of Civil Procedure it is stated that:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons:
>
> • • •
>
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b).

The Receiver and class counsel assert that rescission under Rule 60(b)(2) cannot be sought successfully because no motion was made as required under Rule 60(b)(2); the facts of this case would not warrant a different finding on what otherwise would be "upon such terms as are just" (see argument *infra* as to why rescission is inappropriate); and the evidence was discovered long prior to the fairness hearing and, in any event, within the time in which a motion for a new trial could have been made (ten days after entry of judgment). Furthermore, the Rule also states that a motion made under subsection (b) does *not* affect the finality of a judgment or suspend its operation anyway.

The documents filed by petitioners show definitively that counsel for petitioners filed a Request for Admission directed to certain defendants concerning the letter and telegram which petitioners now designate as "newly discovered" evidence. The Request was filed on September 26, 1977, long prior to the fairness hearing. (See Pet. App., 15-17; paragraphs 2 and 4 of the Request.) There is no possible basis to petitioners' claim that the evidence was "newly discovered."

B. There Was No Basis For Rescission.

Petitioners contend that the court has a right to rescind on a petition being filed disclosing the discovery of the consummation of the sale and acknowledgements of the receipt of the telegram. Respondents respectfully submit that the Court should not at this time reverse the trial court's approval of the settlement offer for these or any other reasons advanced by Petitioners. Rescission is simply not a suitable remedy.

Rescission is a remedy well-recognized in American jurisprudence. It has, however, rather technical conditions precedent which at times make the remedy arduous for victims of alleged fraud and misrepresentation. For instance, as a general rule, a party to a contract who wishes to rescind must place the opposite party in *status quo*. *Van Koten* v. *Van Koten,* 323 Ill. 323, 154 N.E. 146 (1926); *Jockusch, Davison & Co.* v. *O. T. Lyon & Son,* 100 Tex. 594, 102 S.W. 396 (1907); Restatement of Contracts, sec. 349 (1932). Restoration of the consideration is a condition precedent on the theory that because rescission is basically an equitable remedy, a party "to a con-

tract cannot retain the consideration or a part of it and refuse to be bound by the contract or a part of it." *Babcock* v. *Farwell,* 245 Ill. 14, 39, 91 N.E. 683 (1910).

Some courts, particularly Illinois, have taken a hard view toward the return of consideration and have held that the "liability of the party to restore the consideration will not relieve him from the necessity of doing so, and it is sufficient to offer to set off the amount against what is claimed from the other party." *Babcock, supra,* 245 Ill. at 39. In recent years other jurisdictions have recognized a relaxation of this rule, reciting that the remedy is grounded in equity and holding that the "restoration" principle is not absolute and is not to be strictly construed where restoration is impossible, *Delta Investing Corp.* v. *Moore,* 366 F.2d 516 (6th Cir. 1966), or phrased differently, consideration received is to be returned by the party seeking to disaffirm insofar as it lies within his power to do so. *Howard* v. *Howard,* 122 Vt. 27, 163 A.2d 861 (1960); *Delta Investing Corp.* v. *Moore, supra.*

It would be impossible to return the parties to the *status quo* after 8 years delay. The leases were developed by BSW and Mosser. BSW after a period of time was able to recoup its lien on the leases and eventually the problems between Mosser and BSW were refinanced by the Bank of Alice which holds liens on the leases now pending. (12-15-78 Tr. 45). The return of $75,000.00 to place the parties in *status quo* is insufficient. UNI would also be required to comply with its agreed consideration of several millions of dollars under the terms of the Mosser-UNI agreement.

In addition, rescission would require actual litigation of this case and not settlement (12-15-78 Tr. 44). Rescission is a remedy that is derived after evidence is presented. All the defendants who are involved in the rescission remedy have resisted the contention forcefully. In the last analysis, there are no grounds for rescission. At best, as Dawson conceded, both Mosser and UNI contended the other had breached contract obligations and had actually filed suit against the other. (12-20-78 Tr. 36-41). Furthermore, it makes little sense to consider rescission in place of the settlement proposal of BSW and FRB. Because the leases now belong to Mosser, the remedy of rescission or breach of contract could only apply to him. The dangers inherent in the remedy against Mosser, however, are substantial even if liability were established.

Finally, the district court emphasized that rescission could adversely affect the interests of third parties who are entirely innocent of any misconduct. Also, there is substantial evidence that rescission at the present time would affect only three producing oil wells. There are significant reasons, supported by strong evidence, to support the district court's finding that the possible application of the remedy of rescission is not a sufficient basis to disapprove the settlement offer.

The Court of Appeals considered all the foregoing contentions and explicitly rejected them in its Opinion. (Supp. App. 22). Respondents submit that this determination is irrefutable.

II. THERE WAS NO ERROR IN THE REDEFINITION OF THE CLASS.

1. Reasons For The Redefinition.

Following the filing of a Joint Report on May 31, 1977, it was the opinion of the class counsel that there were serious inherent conflicts within the class originally certified, to-wit: "all shareholders of UN Industries, Inc." The only class without inherent conflicts was "All persons who purchased free tradeable shares of stock of UNI on the over-the-counter market through a broker-dealer during the period from July 1, 1968 to and including December 26, 1969." The district court certified the class as such.

Within the original class there were three sub-classes of UNI shareholders who required separate consideration because their interests were either unsupportable or antagonistic to a substantial number of other members within the proposed class. The sub-classes are definable as follows:

(1) Those who acquired their UNI shares prior to July 1, 1968.

July 1, 1968 was the earliest date that any of the defendants committed any wrongful act as alleged in the Fourth Amended Complaint. Those who bought or sold prior to this time were not buyers or sellers who can recover under Rule 10-5 and other pertinent statutes.

(2) Those who acquired their UNI shares subsequent to December 26, 1969.

On or about December 11, 1969, the S.E.C. filed suit against UNI, Charles Oughton, Paul Dawson, Frank Greene, and Harry Mosser. The S.E.C.

raised many of the same allegations asserted in this action. The lawsuit received wide publicity. Any purchaser of UNI stock within a reasonable period thereafter would very probably have acquired it with actual or constructive notice of defendants' fraudulent conduct and defendants could raise that as a defense.

(3) Those who purchased lettered or legended UNI stock at any time.

It was the position of the Receiver that these securities were improperly purchased because they had not been registered as required by law and were either acquired for very low, speculative amounts or were acquired through the defendant Paul Dawson and others. It was the judgment of class counsel that the Receiver's contention in this respect had merit and deserved the court's consideration.

2. Redefinition Of The Class Does Not In Any Event Preclude Valid Claims.

Petitioners may nevertheless substantiate their claims, contrary to what they contend in their Petition. There was no attempt, desire, or intention in redefining the class to deprive anyone from any right or interest of any kind. Shareholders in the above three sub-classes are not left remediless or bereft of any ability to obtain legal representation. The district court has not foreclosed anyone from suing or presenting a claim. It specifically held that *any* stockholder or group of stockholders could present evidence that they had a Rule 10(b)(5) case as to their purchases of UNI stock; that the court preserved the right of any shareholder or group who desired to be included in the class to present evidence at an appropriate

time that he or they purchased shares either before or after the date specified in the class definition at prices artificially inflated as a result of the alleged wrongful conduct of the defendants; and that any shareholder who is able to prove to the court that he suffered damages as a result of the theories of liability alleged in Count I, other than damages sustained generally by the corporation as asserted in the settlement proceeds.

Again, the Court of Appeals expressly considered this contention and rejected it, holding that "the district court's decision to limit membership in the class as described above was fair and reasonable to all involved." (Supp.App. 21). No reasonable person could disagree with this statement.

CONCLUSION

For the reasons given, respondents respectfully state that there is no reason, and certainly no compelling reason for review of this case, and pray that this Court accordingly deny the petition for a Writ of Certiorari.

Respectfully submitted,

JAMES P. CHAPMAN
33 North Dearborn Street
Chicago, IL 60602
263-0789

WILLIAM J. HARTE
111 West Washington Street
Chicago, IL 60602
726-5015
Attorneys for Plaintiffs-Class

JOHN J. CASSIDY, JR.
115 South LaSalle Street
Chicago, IL 60603
781-2227
Attorney for the Receiver

APPENDIX

IN THE

UNITED STATES DISTRICT COURT

For The Northern District Of Illinois

Eastern Division

No. 70 C 189
JOEL D. RUBIN, et al.,

Plaintiffs,

vs.

U. N. INDUSTRIES, INC., etc., et al.,

Defendants.

(Consolidated with Nos. 70 C 336 and 70 C 349)

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING SETTLEMENT PROPOSAL OF CERTAIN DEFENDANTS

The initial cause of action in this consolidated class action was filed on January 27, 1970. By March 10, 1970, two other actions had been filed which involved similarly situated plaintiffs charging virtually identical wrongful conduct by the same defendants. These were the *Rubin* case (70 C 189), the *Ansani* case (70 C 336), and the *Bassi* case (70 C 349). On March 2, 1970, Peter v. Fazio was appointed Receiver of UNI by Order of this court and William Henning Rubin was appointed to act as attorney for the Receiver. On March 10, 1970, the Honorable William J. Lynch, before whom the cases were then pending, consolidated the said causes and on January 5, 1971, ordered that the consolidated cases thereafter would be collectively described as "the consolidated action". The court thereafter determined that the consolidated action was to proceed as a class action; defined the class as "all

shareholders of U. N. Industries, Inc.''; directed that appropriate notice be given to all members of the class; and appointed class counsel.

In due course, the ordered notice was given to the class. (The class was later redefined by court order.) The complaint was amended on several occasions, the last in time being the Fourth Amended Complaint, verified by William Henning Rubin, and filed on or about February 19, 1974. This complaint is brought in two counts, the first as a class action by UNI shareholders for damages and the second as a derivative action on behalf of UNI. UNI also filed a crossclaim against all defendants except UNI.

The Fourth Amended Complaint and the crossclaim allege that the defendants violated Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78(j)(b), and the Rules and Regulations promulgated by the Securities and Exchange Commission and Section 17(a) of the Securities Act of 1934, 15 U.S.C. §77(g)(a), as well as certain common law principles.

Among the defendants joined were The Bank of the Southwest National Association; Houston (hereafter ''BSW''); A. G. McNeese, Jr. (hereafter ''McNeesee''); Harry J. Mosser, Suzanne Mosser and Harry J. Mosser, Jr. (hereafter collectively ''Mosser''); and Financial Relations Board, Inc. (hereafter ''FRB'').

During May, 1978, after extended negotiations, the defendants BSW, McNeese, Mosser and FRB tendered a proposed settlement to resolve the claims of the class members and UNI as alleged in the Fourth Amended Complaint. Pursuant to order of this court, notice of the proposed settlement of said defendants and of the hearing with respect thereto, in the form approved by this court, was mailed to all shareholders of record of UNI and to all class members on November 11, 1978. There was also published in the National Edition of the Wall Street Journal on November 6, 13 and 20, 1978, pursuant

to order of this court, a notice of the proposed settlement and of the hearing with respect thereto. After such notices to all class members and to all other shareholders of UNI, and wherein time was allowed for all shareholders of UNI, class members and other interested persons to object to or otherwise comment upon the propriety of the proposed settlement, the court conducted a hearing on the fairness of the settlement and objections filed thereto on December 15, 1978.

On the basis of its consideration of the record before it, the court enters the following findings of fact and conclusions of law.

Findings of Fact

Terms of Proposed Settlement

1. The proposed settlement provides that in settlement and compromise of all claims and causes of action pending against them:

(a) BSW and McNeese will pay to the Receiver $350,000.00 in cash and McNeese will assign and transfer to the Receiver 50,000 shares of UNI legend stock now registered in his name.

(b) Harry J. Mosser, Suzanne Mosser and Harry J. Mosser, Jr., will pay to the Receiver $350,000.00 in cash.

(c) FRB will pay to the Receiver $85,000.00 in cash and cause its judgment outstanding against UNI in the original amount of $14,866.21 to be satisfied and discharged in full.

The proposed settlement offers of said defendants are conditioned upon court approval of the settlement, dismissal on the merits with prejudice of said defendants from the pending proceedings, execution and delivery of a covenant not to sue said respective defendants by the Receiver on behalf of UNI, and an order barring any further claims or actions by members of the plaintiff class

against said defendants as a result of which the members of the plaintiff class and UNI would be permanently barred and enjoined from asserting any and all claims, demands, or causes of action whether individual, derivative or class, legal or equitable, against said defendants.

Upon court approval of the settlement, defendants Mosser and McNeese have each agreed to deposit, or cause to be deposited with the Receiver or as the court may otherwise direct, the sum of $350,000.00 cash or a cash equivalent, such as a certificate of deposit, a letter of bank guaranty, or other acceptable collateral, which shall be interest bearing, upon condition that if the settlement is reversed on appeal, then said sums shall be returned to defendants Mosser and McNeesse with said interest, but if affirmed on appeal, or no appeal is filed with respect to said settlement, said sums together with the interest thereon shall become the property of the Receiver to be disbursed as the court directs.

Defendant FRB will pay the sum of $85,000.00, and execute a waiver of its judgment on the first day subsequent to the date when the judgment approving the settlement as to FRB and dismissing the action on the merits with prejudice to the Receiver, the plaintiffs and the class as against FRB has become final and (i) the time for appeal has expired or (ii) the judgment is affirmed on appeal and the time for filing a further appeal has expired.

Support for the Settlement

2. One factor considered by the courts in evaluating the fairness of a proposed class action settlement is the degree of support for, as well as opposition to, the settlement. Of approximately 2,463 shareholders of UNI, only three shareholders submitted written objections pursuant to the notices sent to all shareholders and as published in the National Edition of the Wall Street Journal. Joseph Rubenstein, Robert Kaplan and Sam Baldali, respectively,

claim to be the owners of approximately 540,000, 268,000 and 100,500 shares of UNI stock. None testified in opposition to the settlement at the hearing. The only other objection was filed by Attorney William Henning Rubin on behalf of his clients who are members of the class, Joel D. Rubin and Alan Stengel, and also purportedly on behalf of other stockholders not members of the class. The failure of either the overwhelming majority of the shareholders of UNI or the members of the plaintiff class to object to the proposed settlement strongly indicates extensive support for the settlement.

The probability of Success or Failure of a Trial on the Merits

3. Without prejudging in any way the issues joined in this proceeding, the court is concerned with the probability of success of the plaintiffs in the event the case were tried on the merits. All settling defendants have resisted liability vigorously and are represented by capable and competent counsel. Class counsel and counsel for the Receiver have advised the court that the case against BSW and McNeese is fraught with difficult legal and factual problems, a conclusion with which the court agrees. Essentially, the case centers on certain alleged material misrepresentations relative to the lien rights of BSW at the time of the assignment of certain oil leases by the Receiver, with court approval, in January, 1971. As stated by counsel for BSW, there is substantial evidence in contemporaneous writings that there were no such material misrepresentations.

The plaintiff's case against Mosser on the issue of liability is described as good, yet Mosser's counsel presents strong argument that Mosser is the person who has suffered the most as a result of the UNI stock fraud and points out that UNI, in failing to honor its agreements, has caused him to incur very substantial damages. However, the most significant factor supporting Mosser's settlement is his inability to respond in damages to any

judgment that might be entered against him in this proceeding.

The plaintiffs' case against FRB on the issue of liability is described as good, by plaintiffs' counsel, a conclusion resisted strenuously by counsel for FRB. The significant factor supporting FRB's settlement, however, is its inability to respond in damages to any judgment that might be entered against it in this proceeding.

The Ability to Pay of the Settling Defendants

4. Of significant concern to the court is the evidence of the possible inability of certain settling defendants to satisfy a judgment award in the event this case proceeded to trial. Class counsel and counsel for the Receiver have carried out extensive discovery into the financial condition of Mosser and FRB, and there is a significant question whether sufficient assets, if any, would remain to satisfy a judgment award entered against either Mosser or FRB. Substantial actual and contingent claims or liens have been asserted against Mosser, by governmental agencies and the Bank of Alice, Texas, which could very well exhaust his entire assets as well as any assets controlled by him. The offer of FRB represents more than half its total net worth.

Conduct of Negotiations

5. Tne negotiations leading to the proposed settlement have been made at arms length, have been protracted with a give and take by all parties concerned, have led to several proposals which were rejected by class counsel, the Receiver and the Receiver's counsel, and have been undertaken and carried out with the knowledge and approval of this court.

Complexity and Length of the Litigation

6. The proposed settlement offers by the setting defendants have been stated to be the final offers of these

defendants prior to trial. The issues raised in the Fourth Amended Complaint are complex and their litigation will be protracted. All the settling defendants are prepared to litigate the issues vigorously. All are represented by capable, competent counsel. The issues cannot be resolved in one trial because the issues as to BSW, pursuant to order of this court, have been severed and can only be litigated in the United States District Court for the Southern District of Texas, Houston Division. The court finds that the litigation in both trials will be lengthy, protracted, complex and expensive and, because of the difficult issues of fact and law involved, the outcome in either case cannot be predicted with any degree of certainty.

The Conduct of Class Counsel, the Receiver and the Receiver's Counsel

7. Attorney William Henning Rubin has included among his objections, alleged misconduct of class counsel, the Receiver and the Receiver's counsel. These allegations were made in prior proceedings before this court, and the court has ruled them to be without merit. The court again finds these allegations to be without any foundation in fact. The receiver, an attorney of superior reputation in the community, has forthrightly conducted his obligations and responsibilities with unusual diligence, perseverance and thoroughness, as has his counsel. The court notes specifically that notwithstanding the statements questioning his integrity, the Receiver has given attorney Rubin and persons he purportedly represents, as well as the shareholders of UNI and other interested persons, repeated opportunity to advance a plan of reorganization or means of refinancing UNI and its oil properties but without any meaningful or practicable response having been submitted to the Receiver for presentation to this court.

The plaintiff class is represented by competent, experienced attorneys who have performed their responsibilities in the highest professional manner.

The Remedy of Rescission

8. The principal objection advanced by the objectors to the proposed settlement is that remedy of rescission (in the form of a "petition to rescind the sale" by attorney Rubin) is an appropriate remedy to overturn the reassignment of oil leases by the Receiver, and which was approved by this court on June 30, 1971. Their principal contention is that there were misrepresentations of material facts relative to the lien interest of BSW in the oil leases and as to an "anticipation" of consent by BSW to a participation in 25% of the production runs of the oil leases. The court has considered the "petition to rescind the sale" as a suggested remedy under the Fourth Amended Complaint against the defendants Mosser, McNesse and BSW, and thus as a possible alternative to the proposed settlement. However, these defendants have denied any such misrepresentations and have raised substantial defenses to a remedy of rescission. It is a virtual impossibility that the *status quo* can be re-established even if $75,000.00 (the amount paid to the Receiver of UNI upon reconveyance of the oil properties and release of the proceeds from the oil production therefor) were to be returned to said defendants. Rescission could adversely affect the interests of third parties who are entirely innocent of any misconduct. Rescission may not affect BSW and the money it has obtained in satisfaction of the indebtedness of Mosser to it and in release of its liens securing said indebtedness. Finally, there is substantial evidence by said defendants that rescission would affect at the present time only three producing oil wells. The court finds that the possible application of the remedy of rescission does not constitute a sufficient basis in fact or law to disapprove the proposed settlement offered by the settling defendants.

The Redefinition of the Class

9. On May 31, 1977, class counsel and the Receiver filed a Joint Report to the court wherein it was indicated that

there might be antagonistic interests between segments of the class as certified by the court. Accordingly, on December 2, 1977, class counsel caused a motion to be filed to modify the class definition. Following notice to all affected shareholders of UNI and a hearing, the class was redefined by this court by order entered on March 21, 1978, to include the following:

> "All persons who purchased free, tradeable shares of stock of U. N. Industries, Inc., on the over-the-counter market through a broker-dealer during the period from July 1, 1968, to and including December 26, 1969."

Pursuant to the order entered on March 21, 1978, the court preserved the right of any shareholder or group of shareholders of UNI who desire to be included in the class to present evidence at an appropriate time that he or they purchased shares either before or after the dates specified in the class definition at prices artifically inflated as a result of the alleged wrongful conduct of the defendants. Accordingly, the court confirms and finds that any shareholder of UNI who is able to prove to the court that said shareholder suffered damages as a result of the theories of liability alleged in Count I, other than the damages sustained generally by the corporation as asserted in the derivative action alleged in Count II, said shareholder shall participate in the settlement proceeds allocated to the plaintiffs in Count I of the Fourth Amended Complaint.

Allocation of Settlement Proceeds

10. The court finds that the allocation of the settlement proceeds, namely, two-third thereof or $523,334.00 with respect to the issues pleaded in Count I and one-third or $261,666.00 with respect to the issues pleaded in Count II, as proposed by class counsel and the Receiver is fair and reasonable and is hereby approved.

Other Objections

11. Any and all other objections which have been made and are not explicitly addressed in these findings, have been fully considered by the court, together with the objections discussed above; the court regards them individually and collectively as insufficient to cast doubt on the adequacy and fairness of the proposed settlement.

Fairness of Proposed Settlement

12. The court finds that the proposed settlement is fair, reasonable and adequate and is in the best interests of the members of the plaintiff class and the interests of UNI.

Conclusions of Law

1. The court has jurisdiction over the subject matter and personal jurisdiction over the parties;

2. The court determines that the proponents of the proposed settlement have met their burden of persuading the court that the settlement is fair, reasonable, and adequate, notwithstanding the objections presented to it;

3. The "petition to rescind the sale" and all other objections to the proposed settlement are insufficient as a matter of law and are hereby denied.

ENTER:

United States District Judge

DATED: December 22, 1978.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NO. 70 C 189

(Consolidated with No. 70 C 336 and 70 C 349)

JOEL D. RUBIN, et al.,

Plaintiffs,

vs.

U. N. INDUSTRIES, INC., etc., et al.,

Defendants.

ORDER APPROVING SETTLEMENT

Pursuant to Findings of Fact and Conclusion of Law entered this day, the court hereby orders that:

1. The settlement proposed by the defendants, The Bank of the Southwest National Association, Houston, A. G. McNesse, Jr., Harry J. Mosser, Suzanne Mosser, Harry J. Mosser, Jr., and Financial Relations Board, Inc. (hereafter "Settling Defendants"), of the claim and causes of action in Counts I and II of the Fourth Amended Complaint is determined to be fair, reasonable and adequate and is hereby approved by the court. The "petition to rescind the sale" filed by the attorney William Henning Rubin is hereby denied.

2. The action on behalf of the plaintiffs' class in Count I and the plaintiffs in Count II is hereby dismissed as to the Settling Defendants, The Bank of the Southwest National Association, Houston, A. G. McNeese, Jr., Harry J. Mosser, Suzanne Mosser and Harry J. Mosser, Jr., and Financial Relations Board, Inc., with prejudice.

3. The Receiver be, and he hereby is, directed to prepare, execute and deliver on behalf of UNI a covenant not to sue the Settling Defendants in appropriate form.

4. Any further claims or actions by members of the plaintiff class against the Settling Defendants are perm-

anently barred and the members of said class are enjoined from asserting any and all claims, demands, or causes of actions, whether individual, derivative or class, legal or equitable, against the Settling Defendants.

5. The court hereby directs that the settlement proceeds be allocated as follows: two-third thereof or $523,-334. to the members of the plaintiff class in accordance with the allegations pleaded in Count I of the Fourth Amended Complaint, and one-third thereof or $261,666. to the Receiver on behalf of U. N. Industries, Inc., in accordance with the derivative allegations pleaded in Count II of the Fourth Amended Complaint.

6. Class counsel and the Receiver are directed to prepare, execute and deliver the appropriate documents necessary to effectuate the settlement of this cause with the Settling Defendants.

7. The court retains jurisdiction of this action as to the Settling Defendants to supervise implementation of the settlement and retains jurisdiction as to the balance of the defendants who remain in this suit.

8. The court finds, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure as to the final order approving the settlement and dismissing the defendants, The Bank of the Southwest National Association, Houston, A. G. McNeese, Jr., Harry J. Mosser, Suzanne Mosser, Harry J. Mosser, Jr., and Financial Relations Board, Inc., that there is no just reason to delay enforcement or appeal from the said order.

ENTER:

United States District Judge

DATED: December 22, 1978.